IN THE

Supreme Court of the United States

No. .....

October Term, 1944

F. S. LACK,

Petitioner,

vs.

WESTERN LOAN & BUILDING COMPANY, a corporation, and PEARL ASSURANCE COMPANY, LTD., a corporation,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Preliminary Statement.

This is an application to review a decree of the Circuit Court of Appeals for the Ninth Circuit, dismissing an appeal by petitioner from the United States District Court for the Southern District of California, Central Division.

Petition to the court below for rehearing has been denied.

The appeal to the Circuit Court of Appeals was taken for the purpose of obtaining a construction of its opinion

and mandate on a prior appeal and to determine that, under them, petitioner was entitled to interest on moneys awarded in restitution and to damages for delay.

The decree originally appealed from was in equity in two cases consolidated and tried as one, before Judge J. F. T. O'Connor [R.-1 p. 90].* Petitioner was plaintiff in one and defendant in the other. Petitioner will be called "Lack," respondent Western Loan & Building Company will be called "Western," and respondent Pearl Assurance Company, Ltd., will be called the "insurance company."

Lack leased from Western the Hotel Dunlack for a term of six years, commencing on January 1, 1935, and ending December 31, 1940 [R.-1 p. 240]. The lease contained an option to Lack to purchase the hotel at any time during the term of the lease for $35,000 and interest, applying all rentals previously paid towards the purchase price.

An earthquake occurred on May 18, 1940, causing serious damage to the building and this litigation is to determine the rights of the parties in the earthquake insurance, to damages, interest, and costs. The trial court held that the earthquake ended the option by the termination of the lease, because paragraph VI thereof [R.-1 p. 245] provided that if a casualty damaged the building so that it could not be repaired within twenty days after possession given to the lessor for that purpose, the lease should terminate and the parties be released from all obligations thereafter accruing, the court thereafter having

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*R.-1 refers to record on first appeal. R. refers to record on second appeal.

Record on first appeal is contained in Records Volumes I and II. Volume III contains motions made after the opinion was rendered and record on second appeal is in Volume IV. The writer did not have the certified record at the time the brief was printed.

found after a lengthy trial that the building could not be repaired within twenty days.

Except on one disputed issue—*the length of time it would take to repair the earthquake damage, which finding was not disputed before the Circuit Court of Appeals, and Lack's brief specifically so stated at page 2 thereof, there is no dispute as to the facts.*

On December 16, 1940 [R.-1 pp. 2-11], Western brought an action against Lack and the insurance company on the earthquake insurance policies to secure their proceeds, $28,067.87, which the insurance company deposited in court. Lack brought an action against Western for specific performance and damages for delay, or in lieu thereof damages.

This action was removed to the Federal Court by Western and the cases consolidated, including the appeal [R. p. 44].

Lack's complaint for specific performance and damages [R.-1 p. 27] demanded a decree of specific performance: That Western be ordered to repair the damages done to the hotel property by the earthquake and that the insurance money be used to defray the cost of repairs; together with damage to Lack for loss of profit by reason of non-use of said hotel property, or in lieu thereof damages in the sum of $100,000.00, and for costs and for such other relief as might be meet and just in the premises [R.-1 pp. 33-34].

In view of the fact that the second appeal was dismissed and not considered on the merits, it will be unnecessary to more than outline a bare skeleton of the facts in order that this Court may have the issue before it, although in

the interest of justice, petitioner is anxious to have the appeal heard in this Court, and has covered the questions on the merits in the last three points (pp. 36-47, *infra*).

The option to purchase the property is contained in paragraph XI (of the lease) [R.-1 pp. 249, 253]. The price was $35,000 with interest, and Lack was permitted to deliver a promissory note for one-half of the purchase price, secured by a trust deed [R.-1 pp. 251-2].

Western claimed, and the District Court held, that the earthquake ended the lease, the option died with it, and that the installments paid on the purchase price, the interest on $7,000 paid on the purchase price up to April 1, 1940, the proceeds of the earthquake insurance policy in the amount of $28,000, and Lack's improvements to the property, for which he had paid over $18,000, were all of them forfeited.

Lack, as vendee, had obtained earthquake insurance, and he paid the very substantial premiums on it and its renewal for five years. The earthquake policy [R.-1 p. 139] made the loss payable to Western as vendor, and Lack as vendee, per contract-of-sale clause attached to the policy [R.-1 pp. 149, 145]. The rider stated:

> "It is understood that Lack, hereafter termed the 'vendee,' has an interest in the within described property by virtue of a contract of sale from the Company, hereinafter termed 'vendor.'"

The Improvements.

A cooling system costing $16,000.00 [R.-1 p. 775] was installed and other betterments to the building were made by Lack, totaling in all $18,809.00 [R.-1 p. 775].

The Profits.

The hotel was run by Lack during the term of the lease with an average net profit of $900 per month, after deducting all principal payments, taxes, insurance, and operating costs [R.-1 p. 755]. This was admitted [R.-1 p. 756]. The books to support Lack's claim—the original ledger and journal—proving these profits, were admitted in evidence as Defendant's Exhibits "L" and "M" [R.-1 p. 778].

"The purpose," said counsel for Lack, "is to establish a measure of damages in the event that we are entitled to damages as a matter of law" [R.-1 p. 779].

Western refused to be bound by the option at the trial, successfully repudiating it.

After a lengthy trial of the issues on the question of whether or not the building could be repaired in twenty days had been decided by Judge O'Connor upon the trial in favor of Western [R.-1 p. 657], this contention of Western was accepted by Lack on the trial and before the Circuit Court of Appeals as having been finally decided in Western's favor.

Counsel for Lack earnestly urged upon the trial court what Lack's rights were, in the following language:

> "Here is an insurance policy . . . that paid into court . . . larger than '(Western)' were entitled to have at the time the earthquake occurred. *If this court took $19,250 of this $28,000 of insurance money and gave it to Western . . . they would be paid in full and . . . would be obliged to convey.*

> *"The burden of repair, and the information is that it cannot be repaired in 20 days, would fall upon Lack. That is the true position of these parties on May 18, 1940."* [R.-1 p. 823.]

Counsel then pointed out how the court under its equity powers *could* impress a trust on the entire insurance fund and require Western to accept a first trust deed [R. pp. 823-826].

An appeal was taken to the United States Circuit Court of Appeals from Judge O'Connor's decree in favor of Western.

We beg to quote from page 2 of Lack's opening brief on that appeal:

> "Except on one disputed issue—the length of time it would take to repair the building *(which finding will not be disputed here)*—there is substantially no dispute as to the facts." [Italics inserted.]

Again, quoting from page 19 of Lack's brief:

> "Learned counsel for the Company (Western) contended at the trial:
>
> (a) That the repairs could not be made in twenty days. *This issue was decided in its favor (Finding 6, p. 81), and for the purpose of this appeal is settled.*" [Italics inserted.]

It was thus also conceded before the Circuit Court of Appeals that the building could not be repaired in twenty days and that the burden of repairing it fell upon Lack, and no contention to the contrary was ever thereafter made before any court.

There is no merit in the contention of Western that Lack was unwilling to pay the balance of the purchase price—he knew of course that he would have to do that.

He *was* trying to obtain the insurance fund, use it in repairing the building, adding to the fund what was required, and then obtain the conveyance subject to a first trust deed.

This contention on his part, Western seems to claim, forfeited his right to obtain damages.

Since Western had the entire insurance fund in its possession and had received the entire balance of the purchase price out of the court registry on November 4, 1941, we cannot imagine how it can even make such a contention, unless it tendered a conveyance when it obtained the purchase price in full with interest; instead at the trial and thereafter it consistently claimed that it was under no obligation to convey under any conditions [R.-1, end P. V of Answer, p. 63, pp. 722, 724, 843, Finding 6, p. 82].

It made the same contention before the Circuit Court of Appeals.

The first opinion of the Circuit Court of Appeals (third paragraph from the end), indicates that the court may have listened to Western's argument and misunderstood completely the stand which Lack took. *Sed quaere;* the court reversed "so far as appealed from" and we submit that this would seem to somewhat offset our previous statement.

The Second Appeal.

The second appeal is from so much of the decree of specific performance entered on the mandate [R. pp. 12-19] as failed to provide for appellant's damages for delay, for interest on moneys paid to Western on November 4, 1941 [R. mid. p. 13], out of the registry of the court awarded to it by the terms of the previous decree, and awarded to Lack upon appeal, and for trial costs. [See extract from proposed interlocutory decree submitted on behalf of Lack, R. pp. 8-10.]

Lack also appealed from an order denying his motion to amend the interlocutory judgment so as to provide for (a) an assessment of damages for delay [R. pp. 20-21]; (b) the allowance of interest on the fund awarded to Lack by the Circuit Court and withdrawn from the court registry by Western [R. p. 20]; (c) the allowance of costs [R. p. 20]; or in the alternative, that the court make its order granting equivalent relief [R. p. 21] and granting Lack permission to amend his pleadings so as to allege damages [R. P. 3 p. 21].

While amendment of the pleadings was wholly unnecessary (Point IV, *infra*, pp. 45-47), counsel for Lack desired to leave no possible future loophole.

Lack had moved the Circuit Court of Appeals* (Notice of Motion dated April 28, 1943) to modify its opinion so as to indicate to the court below that Lack was entitled to restitution damages and interest. This motion was denied without opinion.

A proposed decree was thereupon submitted to Judge O'Connor which provided for the relief Lack now claims. The Judge expressed doubt as to whether the court's

* Volume III, pages 872-874, see letter of Clerk, *id.* page 871.

opinion and mandate had not foreclosed his consideration of Lack's demand for damages and interest.

A motion was then made in the Circuit Court of Appeals* filed June 8, 1943, returnable June 28, 1943, to recall its mandate and modify its decree by issuing its further instructions.

The facts were pointed out to the Circuit Court of Appeals in an affidavit of the writer, submitted with the notice of motion, and not denied. That affidavit* verified June 15, 1943, deposed as follows:

> "When the proposed decree was submitted to Judge O'Connor, providing for damages and interest" [see said Notice of Motion filed June 8, 1943], . . . "Judge O'Connor stated that he doubted whether he had any jurisdiction to make any alteration whatever in the mandate, even on account of facts which were not comprised in the record on appeal, and that he thought his sole authority was to enter judgment exactly in the terms of the mandate."

This motion was denied without opinion four days before its return date.

The court below thereupon became firmly convinced that the Appellate Court intended thereby to deny to Lack any interest or damages. Hence, the decision appealed from.

It was most unfortunate for Lack that the Circuit Court of Appeals for the Ninth Circuit did not see fit to follow

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*The writer is informed by Mr. O'Brien, the Clerk of the Circuit Court of Appeals for the Ninth Circuit, that these papers are being printed with the record for this Court.

Volume III, pages 880-886, affidavit of Dottenheim, page 887.

the procedure outlined in *Muller v. Croft* (C. C. A., 2d Cir., 1931), 48 Fed. (2d) 206, which would have obviated the necessity for a great deal of subsequent procedure.

That case also involved a doubt as to the construction of the mandate by the trial judge precisely as in the case at bar. The Circuit Court of Appeals then said that under these circumstances

> "we may recall our mandate or deny the motion with expression of our views for the guidance of the District Court. We adopt the latter course for we think the mandate is adequate without amendment."

The court then declared its views.

Western has urgently contended that the denial of these motions by the appellate court was "on the merits" and became the "law of the case," and that for this reason Lack was foreclosed from obtaining any relief.

Since the appellate court denied the motions *inter alia* for restitution (nevertheless later ordered below) how could it, *e. g.*, have decided whether or not restitution carried with it an allowance of interest.

This matter is always one of discretion. The denial of such motions merely means that the court has already spoken and deems its opinion and mandate sufficient.

The right to appeal later if the court below misconstrues the mandate is still left open.

> *Kresge v. Winget* (C. C. A., 8th Cir.), 102 Fed. (2d) 740;
>
> *Kosack v. U. S.* (C. C. A., 3d Cir.), 54 Fed. (2d) 72.

If Western had not repudiated its obligation, the appellant would have been able to start repairing the hotel at the end of 1941. It has been vacant and unrepaired until a few weeks ago. Damages should commence from the date of the decree below, October 31, 1941 [R.-1 p. 94], in view of the dispute until then over the burden of the costs of repairs, or at the latest November 4, 1941 (when Western received payment in full).

Petitioner contends:

(a) The court below should not have dismissed this appeal because:

(1) It had full jurisdiction to determine how its mandate should be construed by the District Court; and

(2) Because the order of February 16, 1944, was a final decision. (First Point, p. 26, *infra.*)

Upon the Merits of the Appeal.

(b) That together with restitution of the money withdrawn from the registry by Western and awarded to Lack, interest should have been allowed from the date of withdrawal to the date of repayment. (Second Point, p. 36, *infra.*)

(c) That Western, having breached its contract to convey, damages for delay caused by the breach are recoverable in this action as a matter of right, and

That the damages recoverable consist of the lost gross income, less what expenses there would have been from the date of the close of the trial until the date when the hotel would with reasonable diligence have been back into operation. (Third Point, p. 37, *infra.*)

(d) That no questions of pleading are involved. (Fourth Point, p. 45, *infra.*)

FIRST POINT.

The Court Below Should Not Have Dismissed This Appeal (1) Because It Had Full and Complete Jurisdiction to Determine How Its Mandate Should Be Construed by the District Court and (2) Because the Order of February 16, 1944 Was a Final Decision.

(1)

Where any error has been made by the court in carrying out the mandate of the appellate court, the latter has full jurisdiction to correct the error on appeal. This is so well settled as hardly to require the citation of authority.

> "It is well understood that this court has power to do all that is necessary to give effect to its judgment."
>
> *B. & O. R. R. v. U. S.*, 279 U. S. 781, 785.

See

United States v. Morgan, 307 U. S. 183,

where the court said:

> "It is a power inherent in every court of justice so long as it retains control of the subject matter of the parties, to correct that which has been wrongfully done by virtue of its process, * * *"

and

Morris v. S. & E. Com. (C. C. A., 2d Cir.), 116 Fed. (2d) 892, 898,

where the court said:

> "If the tribunal to which a cause is remanded misconstrues or fails to follow the mandate of the appellate court, the mandate may be enforced by a new appeal. * * * *Re* Sandford Fork & Tool Co., 160 U. S. 247, 256; Pottsville B. C. v. F. C. C., 105 Fed.

(2d) 36, 39; Home Ins. Co. of N. Y. v. O'Brien, 112 Fed. (2d) 387, 388."

As was said by the court in *Kresge v. Wingate,* 102 Fed. (2d) 740, at the bottom of page 772:

> "It is obvious that if the trial court has mistaken our meaning, the parties will be put to large and useless expenditure of time, means, and effort."

The same rule governs the Circuit Court of Appeals as governs the Supreme Court.

See *Morris v. Securities & Exchange Commission* (C. C. A., 2d Cir., 1941), 116 Fed. (2d) 896:

> "Where a tribunal to which a cause is remanded misconstrues or fails to follow the mandate of the appellate court, the mandate may be enforced by a new appeal." (Headnote (3).)

We submit that in the case at bar where Judge O'Connor drew up his own decree and entitled it "interlocutory decree pursuant to the mandate of the Circuit Court of Appeals" [R. p. 12], and proceeded therein to construe that opinion and mandate [R. pp. 15-19], it left no room for the Circuit Court of Appeals to avoid the consideration of the issues on the merits by dismissing the appeal on the theory that Judge O'Connor and counsel were on a frolic of their own, as it were, and were not following the mandate at all.

Of course, and in every case, if error is made in construing a court's mandate, in one sense the court below does not follow the mandate; otherwise there would never be any reason for an appeal.

(2)

The order of the District Court of February 16, 1944, appealed from, was a final decision because it denied appellant interest on the moneys ordered to be paid in restitution, denied appellant damages for breach of contract, denied appellant costs, and denied appellant permission to file an amended or subsequent complaint and obviously terminated the litigation.

On January 17, 1944, Lack moved the court below to amend the interlocutory decree by:

(1) (a) Allowing interest on the moneys withdrawn from the registry by Western, together with costs.

(b) Ordering a reference to ascertain damages for delay.

(c) Or in the alternative, ordering a hearing by the court to ascertain damage.

(d) And providing for judgment for damages for delay.

(2) That in the alternative and pursuant to the terms of the interlocutory decree granting Lack leave to apply for other and further relief, that Lack be granted the relief set forth, and, if the court was of the opinion that the pleadings are insufficient that Lack be granted leave to amend, and

(3) That he have such other and further relief, etc.

This motion was denied *in toto* by minute order and exception allowed.

The order was made for the express purpose of finally deciding these questions so they could be reviewed by the appellate court.

The appeal was *inter alia* from this order and from each and every part and the whole thereof.

This order was a final decision and appealable under the meaning of Section 128(a) of the Judicial Code, 28 U. S. C. A. 225a.

It decided all of said matters adversely and finally against Lack.

Even if it left other matters open (which it did not) it was a final decision, and hence appealable. Upon this point the authorities are entirely clear and uniform.

The Authorities.

In *Ex parte Tiffany*, 252 U. S. 32, the U. S. District Court had made an order refusing to turn over to a state court chancery receiver certain property *in custodia legis*. The state court receiver appealed to the United States Circuit Court of Appeals from this order, and the appeal was dismissed by that court on the ground that the order was not a final decision.

This Court granted certiorari and reversed, saying:

> "By the order the right of the State Receiver to possess and administer the property of the corporation was finally denied." (P. 36.)

By the minute order of February 16, Lack's right to costs, interest, and damages were finally denied.

Jacobson v. Jacobson, 126 Fed. (2d) p. 13, bot. p. 15.

"The finality of order depends not on its name, *its propriety*, or its normal function, but whether it disposes of the whole case on its merits."

Reaves v. Beasdell (1942), 316 U. S. 283, 86 L. Ed. 1478.

"If an order entered affects a substantial right of a party so as to deny relief except by appeal the order is appealable."

Odell v. Batterman Co. (C. C. A., N. Y., 1915), 223 Fed. 292.

In the Ninth Circuit, see *Krooker v. Knudsen* (C. C. A., 9th Cir., 1916), 232 Fed. 857, where the court held that if the litigation is terminated on any "*severable phase thereof*" (p. 858) the order is appealable.

"The question of whether a decree is final and appealable is not determined by the name which the court below gives it, but is decided by the appellate court on consideration of the essence of what is done by the decree. Potter v. Beale (Mass., 1892), 2 C. C. A. 60."

The Attualita, 238 Fed. 909.

By this test, indeed, the interlocutory judgment was appealable for Judge O'Connor refused to incorporate therein the provisions for interest, damages, and costs.

And even where the court reserves jurisdiction (as it did in the case at bar) if it later denies the motion for the purpose for which it reserved jurisdiction, the judgment is final.

Bahler v. U. S. (C. C. A., Mo., 1943), 137 Fed. (2d) 98.

Nor do the words "final decision" mean that the proceedings are wound up; only that the particular matter under consideration involving a phase of the litigation is finally decided.

Suffold Co. v. Acres (C. C. A., N. Y.), 129 Fed. (2d) 678, certiorari denied 317 U. S. 698;

Reeves v. Beardall, 316 U. S. 283;

City of Louisville v. Levi (C. C. A., Ky., 1944), 140 Fed. (2d) 512.

If the right of Lack to damages, interest, and costs is denied by the order, it is a final decision and appealable.

28 U. S. C. A., Note 32, p. 321;

National Brake Shoe Co. v. Christensen (C. C. A., Wis., 1919), 258 Fed. 880, prohibition denied;

La Burgogne, 210 U. S. 95;

Reeves on Federal Procedure 135.

The District Court Had Full Jurisdiction to Award to Petitioner the Relief Demanded.

Assuming that the appellate court intended by its opinion to award final judgment for specific performance which latest opinion (at late last) states was its (unexpressed) intention since that opinion was accompanied by its mandate to:

> "Take further proceedings * * * in accordance with the opinion and decree of this court * * * as according to right and justice * * * ought to be had,"

it still, we submit, gave the Court below full jurisdiction to award damages; and if its intentions were otherwise it was, we further submit, in error.

The Circuit Court of Appeals did not in its first opinion express any views whatever on Lack's right to restitution, damages, or interest; but Lack contends that a necessary corollary to its opinion was their allowance.

The complete reversal and the order for further proceedings, we claim, entitled Lack to damages for delay.

In the *Thornton* case (109 Fed. (2d) 316) the Third Circuit Court of Appeals said that *where there is a reversal*

> "on remand the trial court is free to pass on any issue which was not expressly or impliedly disposed of on appeal."

So in the *Kosack* case (54 Fed. (2d) 72) the same Circuit Court of Appeals had reversed a judgment without ordering a *venire de novo.*

The Appellate Court said:

> "We find no mistake in the simple entry 'judgment reversed' without a direction for new trial . . . We cannot recall a mandate to correct a mistake which is not there, nor, had we the power, are we inclined through amendment to make certain by express words what in law the words themselves imply; in some cases of reversal re-trial is necessarily intended." (Bottom p. 72.)

As to Interest.

Where the mandate is silent as to restitution it must nevertheless be ordered by the court below.

> 5 *C. J. S., Appeal and Error,* Sec. 1979, p. 1542.

In the case at bar, restitution was granted by the District Court and we are utterly unable to perceive how the

Circuit Court of Appeals could find authority there to grant restitution and none to grant interest. How could the appellate court consistently say that it had ever passed on the question of whether or not interest was allowable on the sum restored by the court below?

Where restitution is ordered, interest will also be ordered.

B. & O. R. R. v. U. S., 279 U. S. 781, 785.

> "And thereupon each (of appellants) became entitled to have the amounts so paid, together with interest thereon from the date of such payment at the rate established by the law of the state in which such payment was made." (P. 785.)

The interest question will be more fully discussed in Second Point, page 36, *infra*.

(c) Upon the Jurisdiction of the District Court to Award Damages.

Mr. Justice Frankfurter in *Sprague v. Ticonic Nat'l Bank*, 307 U. S. 161, 166, observed that:

> "While the mandate is controlling on all matters within its compass, the court below is free on other issues." (P. 166.)

Marker, in his Federal Jurisdiction in the Circuit Court of Appeals, Section 255, page 30, says:

> "The court may remand the case with instructions to the lower court to enter such judgment as the situation demands."

This Court has said:

> *"The fact that the mandate contains a provision authorizing further proceedings removes all question of the power of the District Court."*
>
> *R. R. v. St. Louis Ry. Co.*, 249 U. S. 134, 143.

The further proceedings clause in the case at bar gave the District Court ample power, and therefore on appeal the Circuit Court of Appeals should have assumed jurisdiction and determined these questions of interest, damages, and costs.

California cases directly in point are not lacking.

> *Clutter v. Superior Court*, 35 Pac. (2d) 152, 145 Cal. App. 135 (Dist. Ct. of App., 2d Div.),

involved the title and right to the possession of certain property and the Supreme Court of California (*Conlin v. Blanchard*, 28 Pac. (2d) 12) had reversed and ordered judgment for defendant settling the right to possession.

The mandate of the Supreme Court (as the mandate in the case at bar) had failed (by silence only) to order an accounting for the reasonable rental value of the property and for damages for the unlawful withholding.

The Superior Court nevertheless included this relief in its judgment entered on the mandate, whereupon the defeated party petitioned the District Court of Appeal for a writ of prohibition to the District Court of Appeal, to prevent this relief being granted.

The petitioner's position was stated by the court as follows:

> "Petitioner here contends that respondent court had no jurisdiction to do anything more than enter

judgment as directed, and seeks to restrain such further proceedings determining the issue of damages for the unlawful withholding of such property or an accounting for the reasonable value thereof."

The court held that the court below was right in that it followed the general direction contained in the mandate, citing

Raun v. Reynolds, 15 Cal. 459, 468,

and denied the petition for the writ.

The rule guiding a court below in entering a Decree in Equity, upon a mandate from the appellate court, is well stated by the Supreme Court of California in the case of

Barnhart v. Edwards, 128 Cal. 572,

where the court says:

"The direction of this court for the entry of judgment in accordance with the findings as corrected had reference to the ultimate act to be performed by the Superior Court, but did not prescribe the judgment which it should enter. The form of the judgment, including its various provisions, was left to the judgment of that court to be exercised with due regard to preserving and protecting the rights of the several parties thereto under appropriate and established principles of equity. *If any change in the relation of the parties to the judgment or to the property involved therein had supervened pending the appeal, and was brought to the notice of the court, it was proper for it to adapt its judgment to such change so far as would be consistent with the rights of others and with recognized rules of procedure.*" (P. 574.) [Italics ours.]

SECOND POINT.

That Besides Restitution the District Court Should Have Allowed Interest on the Sum Awarded Petitioner.

In discussing restitution in an equity suit the court in

Bertholdi Jennings Lumber Co. v. St. Louis, R. R. Co., 80 Fed. (2d) 32,

at page 40 points out that instead of requiring restitution in the equity suit, a separate original suit might have been brought sounding in *indebitatus assumpsit*, which only lies in the case of a contract, express or implied.

3 *Cal. Jur.*, Sec. 4, p. 376.

Interest is the compensation allowed by law for the use, forbearance, or detention of money.

Cal. Civil Code, Sec. 1915.

And where there is a contract to pay money, express or implied, interest follows as a matter of right.

Cal. Civil Code, Sec. 3287.

Western having taken money which in equity belonged to Lack, a promise to repay it was implied from its taking.

The law implies a promise to repay wherever B receives proceeds which should go to A and the right is in the nature of *indebitatus assumpsit*.

3 *Am. Jurispru.* 748;
96 *Am. St. Reports* 143.

Interest is recoverable by virtue of an implied contract to repay it

14 *Cal. Jur., Interest*, Sec. 2, p. 672,

and as a matter of right (p. 673).

THIRD POINT.

Western Having Breached Its Contract to Convey, Damages for Delay Caused by the Breach Are Recoverable in This Action as a Matter of Right.

The right to recover actual damages is property

25 *C. J. S., Damages,* Sec. 7, p. 465,

and is a legal right.

W. H. Osborn v. Lach, 135 N. C. 628, 66 L. R. A. 648;

1 *Cooley, Constitutional Limitations,* 583 *et seq.*

Lack claims no damages for the period during which he was insisting that he would not accept the conveyance of the hotel unless Western fulfilled their claimed duty to repair the hotel, but only from the close of the trial when he clearly became entitled to an immediate conveyance.

If the possession of personal property is unlawfully withheld from its rightful owner for 48 hours, there could be no question of the owner's right to damages for loss of use.

In the case at bar Western repudiated its contract to convey upon the trial, since November 4, 1941 has had the entire purchase price of the property, and maintains that because Lack had once claimed that Western was under the obligation of repairing the hotel, and tried to secure the credit terms to which his contract entitled him, he has foreclosed himself of the right to damages.

The true rule is stated in

> *Vi Bar Petroleum Co. v. Crow* (C. C. A., 10th Cir.), 40 Fed. (2d) 488, 492,
>
> "After repudiation by one party, other parties were excused from tendering performance *so long as repudiation was not retracted and for a reasonable time thereafter.*" [Italics ours.]

Even though Lack insisted on his original claim of Western's duty to repair, after he abandoned that claim, Western was under a duty of performance.

See also:

> *Willard v. Taylor,* 75 U. S. 556, 569.

Lack's only right to claim damages is in this action. If the court does not award damages in this action his right to damages is lost altogether, and he is entirely without the right to any relief.

> *Abbott v. The 76 Land and Water Co.,* 161 Cal. 42, 118 Pac. 425,

was an action brought by plaintiff to recover damages for breach of a contract for the sale of land, after plaintiff had been successful in another action in securing specific performance of the same contract.

The court held that plaintiff had been entitled to recover his damage in the specific performance action, and although he had not claimed any in that action, the judgment he had obtained in that action was a bar to this one. The court said:

> "He might have brought an action to recover such damages as were caused him by the breach, or he

might, as he did, bring an action for specific enforcement of the contract, and in such action obtain not only the specific enforcement of his contract, but also such damages as he was lawfully entitled to, for it is thoroughly settled that a court of equity taking jurisdiction for the purpose of specifically enforcing a contract takes full jurisdiction of all the rights of the parties, whether legal or equitable, and may award such legal damages as the vendee may have suffered by reason of the delay in performance. (See 2 Warvelle on Vendors, sec. 958; 36 Cyc. 753.) But, under elementary principles, he was bound to obtain all his relief on account of the breach in one action and could not recover part in one and part in another." (27 R. C. L. 631.) (Opinion p. 47.)

"The court is in truth giving damages to the purchaser for the loss sustained by him for the contract not having been specifically and literally performed."

Per Turner, L. J., in *Prothers v. Phelps*, 7 Dec. M. & G., at p. 734.

Fry, Spec. Performance, 6th Ed., Sec. 1299, p. 600.

The usual and normal procedure was here adopted.

Shelfer v. City of London El. Co. (1895), 1 Ch. Div. 287, 311, 315;

Engel v. Fitch L. Ry., 7 H. L. 158;

Jacques v. Miller, 6 Ch. Div. 153.

One of the leading cases in this country is

Worall v. Munn, 38 N. Y. 137,

which has been followed in New York and in most jurisdictions, including California, and the Federal courts ever since.

The headnote gives the rule.

> "When a court of equity sustains a bill filed to compel specific performance of a contract for the conveyance of lands . . . according to its settled modern practice" [it will award] ". . . also the damages which the defendant has caused by his refusal and delay in the performance of his contract, and these may be ascertained in any mode which its discretion approves."

Woodruff, J. (p. 142), observes that:

> "the Court of Equity will, so far as possible, place the parties in the same situation as they would have been if the contract had been performed according to its terms."

In the Federal courts, the entire damage will be allowed in the action for specific performance.

> *Oklahoma Nat. Gas Corp. v. Municipal Gas Co.* (C. C. A., 10th Cir.), 38 F. (2d) 444, at 447.

and the court will grant discovery to ascertain them.

> *Peal v. Marian Coal Co.*, 172 Fed. 639, 640.

Directly in point and most apt are the comments of the court in

> *Jones v. Gardiner*, L. R. (1902), 1 Ch. 191,

awarding damages for delay in a specific performance case where part of the delay was caused by plaintiff. He said:

> "I am of the opinion that a very considerable part of the delay which has occurred (after making full allowance for the time which may fairly be considered to have been due to difficulties in making title,

> and to a controversy as to the form of the conveyance)" [just as here we have delay occasioned by the dispute regarding whose duty it was to repair], "has arisen entirely from the default of the vendor—default, that is, in doing what he could reasonably and fairly have done had he been duly careful to fulfill his contract. . . . The contract might certainly have been carried out—making a liberal allowance for the delay in consequence of the difficulties and discussions I have referred to, three months earlier than the actual date of completion."

The court accordingly allowed damages for three months' delay in addition to specific performance and required the defendant to pay costs.

This claim of counsel for Western under this heading is entirely untenable.

See:

> *Engel v. Fitch*, L. R. 7 H. L. 158,

which holds that where the breach of contract arises from

> "refusal to take the necessary steps . . ." [the rule that] "further damages may be recovered, appears to remain good law." (P. 195.)

The court awarded the plaintiff £25.

See also:

> *Fry on Specific Performance*, Sec. 1306, p. 604; Sec. 1307, p. 605; Sec. 1314, p. 608.

The usual course is to direct an inquiry as to damages in Chambers (in England).

> *Id.*, Sec. 1304, p. 608.

In

Pomeroy, Specific Performance of Contracts, 3d Ed., Sec. 474,

the author says:

"Where jurisdiction is acquired * * * damages may be assessed * * * as ancillary to the equitable relief so that plaintiff may not be put to the expense of a second suit in another tribunal."

Story on Eq., 794, 796, 798.

See also:

Pomeroy on Civ. Rem., 76-85;

58 *C. J., Specific Performance*, Sec. 591, p. 1240; Sec. 592, p. 1241; Sec. 593, p. 1245;

Lynch v. Wright, 94 Fed. 703, 704;

23 Cal. Jur., Specific Performance, Sec. 67, top of page 513;

Daiken v. Cope, 2 Russ. 170, 3 Eng. Ch. 170; 38 Repr. 299.

The damages recoverable consist of the lost gross income less what expenses there would have been from the date of the trial to the date when Lack will be able to put the hotel back into operation with reasonable diligence.

The rules of law on this subject are well settled. This hotel produced a large average profit over a period of years.

Special damage for the loss of profits on account of delay are recoverable in a specific performance action.

17 *C. J., Damages*, Sec. 112, top of p. 775; Sec. 113, p. 788, and top of p. 790; Sec. 117, p. 796;

25 *C. J. S.*, Damages, Sec. 42, p. 517;

Taber Lumber Co. v. Oncillo, 160 Fed. 596;

4 *Nichols' Applied Evidence*, 1928 Ed., bottom of p. 3718;

Central Coal Co. v. Hartman, 111 Fed. 96, 99;

Wade v. Leroy, 20 How. 34, 15 L. Ed. 13.

Where plaintiff contracted with defendant for a lease, for the purpose, as defendant knew, of carrying on a business, and owing to defendant's wilful refusal to perform, plaintiff was for 15 weeks unable to commence his business, the court, in addition to specific performance, awarded plaintiff £250 damages for his loss of profits for 15 weeks.

Jacques v. Miller, 6 Ch. D. 153, per Justice Fry (Justice of the High Court attached to Chancery Division), at p. 160, 26 W. R. 368,

followed in

Royal Bristol & Co. v. Barnash, 35 Ch. D. 390.

See also:

Morall v. Munn (*supra*).

Sanborn, J., in

Central Coal and Coke Company v. Hartman, (U. S., C. C. A., 8th Cir.), 111 Fed. 96,

said:

"The truth is that proof of the expenses and income of the business anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to lawful judgment for damages for the loss of the anticipated profits of an established business" (page 99). (Citing (*inter alia*) 1 *Sedgwick on Damages*, Sec. 182.)

See also:

Hollander v. Wilson, 214 Cal. 582, 587, 7 Pac. (2d) 177, 179;

Storley v. Armour & Co., 107 F. (2d) 499;

Eastern Terminal Lumber Co. v. Stitzinger, 35 F. (2d) 233;

Baltimore & Ohio R. R. Co. v. Becker & M. Co., 272 Fed. 933.

"It is sufficient that there may be data from which they '(the profits)' may be ascertained with a reasonable degree of certainty and exactness."

Eastern Term. Lumber Co. v. Stitzinger, supra.

"A loss of profit from the interruption or destruction of an established business may be recovered if the actual loss is rendered reasonably certain by competent proof."

Clover Valley Lumber Co. v. Sierra Valley etc. (Cir. Ct. of App., this Circuit), 18 F. (2d) 858;

McC. v. Coronovan, 149 Cal. 60, 8 L. R. A. N. S. 1171, 85 Pac. 928.

In view of the offer of proof below, followed by the concession of counsel, it may be assumed that Lack's damages were as stated, and it is respectfully submitted that the mandate should provide for the assessment of damages according to the rules thus laid down.

FOURTH POINT.

No Questions of Pleading Are Involved.

(a) Lack sufficiently pleaded his damage for specific performance.

Complaint, Par. XI, end of paragraph [R.-1 p. 32]; Par. II of the Second Cause of Action [R.-1 p. 32].

His prayer for relief was for specific performance together with damages to the plaintiff for loss of profits [R.-1 p. 34], and the usual "for such other and further relief," etc.

The question of pleading was never raised by Western.

Moreover, at the trial, the objection of counsel for Western to the proof of damages for delay was not addressed to a question of pleading.

His observation to the court herefore quoted from [R.-1 p. 780] clearly shows this.

(b) No pleading was required.

In a specific performance action Lack was entitled to his damages without other pleading under his prayer for general relief.

> *McCormick v. Oklahoma City* (C. C. A., 8th Cir., 1913), 203 Fed. 921; appeal dismissed 236 U. S. 65;
>
> *Aldrich v. Hines*, 110 Oklahoma 53, 236 Pac. 16 (citing numerous cases).

In *Mellon v. St. L. & T. Co.* (C. C. A., 8th Cir.), 240 Fed. 359, 363, the court says:

> "In Omaha Ry. v. Cable Tramway Co. (C. C.) (32 F. 727) it was claimed that the Circuit Court

was without jurisdiction to assess damages in an action only praying for an injunction. Mr. Justice Brewer, then Circuit Judge, denied this contention, *upon the ground that there was also a prayer for general relief in the bill*" (as in the case at bar).

Said the court:

". . . It is familiar law that the court may award such other relief as is justified by the facts stated in the bill, and may fairly have been considered within the contemplation of the parties in the litigation" (citing numerous federal cases at p. 393).

(c) The damages claimed commenced after the trial; in equity they need not be pleaded.

A fine statement of the rule as it applies to the case at bar is contained in the case of

Conrad v. Kemp, 137 Neb. 900, 219 N. W. 668,

where the court says:

"The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the beginning of the litigation, *but at the time the decree is entered.* Superior Oil and Gas Co. v. Mehlin, 25 Okla. 809, 108 Pac. 545; Randel v. Brown, 2 How. (U. S.) 405; McCormick v. Oklahoma City, 203 Fed. 921; Hanscom v. Melrose Gas Light Co., 220 Mass. 1, 107 N. E. 436 . . ." and citing other cases (p. 902).

It is unnecessary to file any supplemental pleading to recover damages arising after an action in equity has been commenced.

Coleman v. Dawson, 110 Cal. App. 201, 213;

21 *Cal. Jur.*, Pleading, Sec. 115, p. 169;

Union Oil Co. v. Mutual, 19 Cal. App. (2d) 409, 65 Pac. (2d) 896;

Collins v. Sargent, 89 Cal. App. 105, 112, 113;

Pennsylvania v. Bond, 99 Ill. App. 535, 544; affd. 202 Ill. 95, 66 N. E. 941.

(d) Lack's rights are preserved under the Federal Rules of Civil Procedure.

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if raised by the pleadings. Such amendments as may be necessary to conform them to the evidence and to raise these issues may be made by any party at any time, even after judgment; *but failure to so amend does not affect the result of the trial of these issues.*" (Rule 15(b), Federal Rules of Civil Procedure.)

The offer of evidence is covered by Rule 43(c) *Id.*

If there was any question whatever it is submitted that in the interests of justice the court should have granted Lack's motion for leave to amend his complaint and to file an amended and supplemental complaint setting forth his damages (pp. 21, 22). This leave was also denied.

> "Leave [to amend] shall be freely given when justice so requires." (Rule 15(a), Federal Rules of Civil Procedure.)

Conclusion.

For all of the foregoing it is respectfully submitted that this petition for writ of certiorari be granted and that in the interests of justice that this court consider the appeal on the merits.

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Attorneys for Petitioner.

HENRY S. DOTTENHEIM,
Of Counsel.

Opinion of the Circuit Court of Appeals for the Ninth Circuit on the Second Appeal.

F. S. Lack, Appellant, vs. Western Loan & Building Company, a corporation, and Pearl Assurance Company, Limited, a corporation, Appellee. No. 10,730.

Dec. 30, 1944.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before MATHEWS, STEPHENS, and HEALY, Circuit Judges.

MATHEWS, Circuit Judge.

In Lack v. Western Loan & Building Co., 9 Cir., 134 F. 2d 1017, we reversed, in part, a judgment of the district Court of the United States for the Southern District of California and remanded the case to that court with directions to enter judgment awarding to Western $19,250 of the $28,067.87 which had been deposited in the registry of the court by Pearl Assurance Company, Limited, awarding to Lack the balance ($8,817.87) of the $28,067.87, and requiring Western to convey certain property to Lack.

Our mandate was issued on May 29, 1943, and was filed in the District Court on June 3, 1943. That court did not enter judgment as directed by our mandate and, so far as the record shows, was not requested by either party to enter such judgment. Instead of requesting such entry of judgment, Lack requested the court to enter an interlocutory decree and on July 12, 1943, submitted to the court a proposed form of interlocutory decree. On September 15, 1943, he withdrew that form and proposed another form of interlocutory decree.

On December 20, 1943, the District Court entered an interlocutory decree entitled "Interlocutory Decree Pursuant to Mandate of the Circuit Court of Appeals." Actually, the interlocutory decree was not pursuant to this court's mandate, for that mandate did not direct the District Court to enter an interlocutory decree, but directed it to enter judgment—meaning, of course, a final judgment.

The interlocutory decree was, in part, as follows: "It is Ordered, Adjudged, and Decreed, * * * That this decree is interlocutory; * * * That (the District Court) retains jurisdiction for the determination of the matters herein undisposed of and * * * Lack is hereby granted permission to apply for such other and further relief regarding the matters herein described and for costs of suit incurred in the District Court."

On January 24, 1944, Lack moved the District Court to "resettle and amend" the interlocutory decree. On February 7, 1944, Western moved to strike a part of Lack's motion. On February 16, 1944, the court entered an order granting Western's motion and denying Lack's motion. From the interlocutory decree and from the order of February 16, 1944, Lack has appealed.

Neither the interlocutory decree nor the order of February 16, 1944, was a final decision, within the meaning of p. 128 (a) of the Judicial Code, 28 U. S. C. A., p. 225 (a). Both were interlocutory. Neither was appealable.

Appeal dismissed.

(Endorsed): Opinion. Filed Dec. 30, 1944. Paul P. O'Brien, Clerk.

Opinion of the Circuit Court of Appeals for the Ninth Circuit on the First Appeal.

In the United States Circuit Court of Appeals for the Ninth Circuit.

F. S. Lack, Appellant, vs. Western Loan & Building Company and Pearl Assurance Company, Limited, Appellees. No. 10,158. (134 Fed. Supp. 1017.)

Apr. 9, 1943.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before MATHEWS, STEPHENS and HEALY, Circuit Judges.

MATHEWS, Circuit Judge.

In the District Court of the United States for the Southern District of California, Western Loan and Buildinb Company, a Utah corporation, hereafter called Western, brought an action against F. S. Lack, a citizen of California, and Pearl Assurance Company, Limited, a British corporation, hereafter called Pearl. Western prayed judgment against Pearl for $28,067.87 and prayed judgment against Lack quieting Western's title to the $28,067.87. Lack answered, praying judgment against Western for $28,067.87. Pearl deposited $28,067.87 in the registry of the court, there to abide the judgment of the court, and filed an answer stating that it had done so and praying to be discharged from further liability.[1]

In a State court of California, Lack brought an action against Western for specific performance of a con-

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[1]Judicial Code, §24(26) (c), 28 U. S. C. A., §41(26) (c); Federal Rules of Civil Procedure (28 U. S. C. A. following §723c), Rule 67.

tract between him and Western or (in lieu thereof) damages in the sum of $100,217.87, and for such other relief as might seem meet and just. On petition of Western, this action was removed from the State court to the District Court of the United States for the Southern District of California. There Western answered, praying that Lack take nothing, and that Western have judgment quieting its title to a building called the Hotel Dunlack in Brawley, California, the land on which the building stood, and all furniture, furnishing, fixtures and equipment[2] located in the building.

The actions were consolidated, trial was had, findings of fact and conclusions of law were made and filed, and judgment was entered (1) discharging Pearl from further liability, (2) awarding the $28,067.87 to Western, (3) quieting Lack's title to all furniture, furnishings, linens, dishes and silver located in the building and to all restaurant equipment located in and not attached to the building, and (4) quieting Western's title to all other property, real and personal, hereinabove mentioned. From parts (2) and (4) of the judgment Lack has appealed. Parts (1) and (3) are not appealed from. The facts are as follows:

Prior to September 6, 1934, Western became the owner of the land and building hereinabove mentioned, and Lack became the owner of the furniture, furnishings, linens, dishes, silver and restaurant equipment located in the building. On September 6, 1934, Lack wrote Western a letter reading, in part, as follows:

"For your consideration, I respectfully submit the following offer for the Hotel Dunlack property, located in

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[2]Including linens, dishes, silver and restaurant equipment.

Brawley, California: The total purchase price to be $35,000.00, and to be paid as follows: Interest to be six per cent per annum, commencing January 1st, 1935, payable quarterly for the first year. Thereafter, in addition to the interest, $900.00 to be paid quarterly on the principal, until the full purchase price is paid. That is, principal payments shall commence January 1st, 1936. All taxes and assessments on the property to be paid by me, before delinquency. As a guarantee that all payments, outlined above, will be made promptly, I will give you bill of sale for all the furniture and fixtures now contained in the said property, free and clear of all encumbrance. * * *"

On October 30, 1934, Lack executed a bill of sale transferring to Western all furniture, furnishings, linens, dishes, silver and restaurant equipment then located or thereafter to be placed in the building. On November 10, 1934, Western and Lack executed a contract whereby Western leased all the property[3] to Lack for the term of six years commencing January 1, 1935, and ending December 31, 1940, and granted him an option to purchase the property for $35,000. This was the contract of which Lack, in his action against Western, sought specific performance. The contract provided:

"The rent for the premises hereunder demised, which rent the Lessor [Western] hereby reserves and which rent the Lessee [Lack] hereby covenants to pay shall be payable as follows:

"The Lessee agrees to pay and the Lessor agrees to accept the following sums: Five Hundred Twenty-five

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[3]Land, building, furniture, furnishings, fixtures and equipment, including linens, dishes, silver and restaurant equipment.

and no/100 Dollars ($525.00)[4] on January 1, 1935; Five Hundred Twenty-five and no/100 Dollars ($525.00) on April 1, 1935; Five Hundred Twenty-five and no/100 Dollars ($525.00) on July 1, 1935; Five Hundred Twenty-five and no/100 ($525.00) on October 1, 1935; Fourteen Hundred and no/100 Dollars ($1400.00)[5] on January 1, 1936, and quarterly thereafter the sum of Eight Hundrew Seventy-five and no/100 Dollars ($875.00) plus interest at the rate of six per cent (6% per annum on the balance remaining under this lease;[6] said rents falling due on the first day of January, April, July and October of each year until the expiration of this lease.

"Said rent is to be paid * * * to the Lessor at 1005 South Hill Street, Los Angeles, California, or at such other place as the Lessor may from time to time designate by written notice to the Lessee.

"In addition to the payments aforesaid, the Lessee agrees, in order to take care of the taxes herein agreed, to be paid by him, to pay or deposit with Lessor monthly, a sufficient amount so that the aggregate thereof on the date when taxes become due, shall be sufficient to pay the taxes on said premises and properties when due. * * *.

"The Lessee further covenants and agrees to keep said premises and properties, including but not limited to the roof, windows and side walls, in good order and repair during the term hereof. * * *

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[4]Interest on $35,000 (the purchase price of the property) for three months at 6% per annum.

[5]Interest on $35,000 for three months at 6% per annum, plus $875.

[6]The contract did not define or explain the phrase "balance remaining under this lease," but the parties treated it as meaning the unpaid part of the purchase price.

"All alterations, repairs, additions or improvements made upon the demised premises by the Lessee shall be the property of the Lessor and shall remain upon and be surrendered with the demised premises upon the expiration of this lease. * * *.

"If the demised premises be damaged by fire or other casualty so that they cannot be repaired or restored within twenty (20) working days after possession is given to the Lessor for that purpose, then and in that event this lease shall terminate and the parties hereto shall be released from all obligations hereunder thereafter accruing, but if such damage can be repaired within said period of twenty (20) days then and in that event the Lessor shall repair said demised premises at its own cost and expense, provided that labor and materials can be obtained at the then prevailing rates, reasonable allowance being made for any delay from strikes or other causes beyond the control of the Lessor. * * *

"The Lessee covenants and agrees to keep at all times during the term hereof all buildings and improvements, which are now or shall hereafter be erected upon said premises and the furniture and furnishings therein, insured against loss or damage by fire in an amount, satisfactory to the Lessor, and such other insurance as the parties may agree upon, in some insurance company or companies approved by the Lessor, * * * and to pay all premiums upon such insurance promptly when due, the policies for all of which insurance shall be satisfactory in form and substance to the Lessor. All of said policies of insurance shall provide that loss thereunder shall be payable to the Lessor and shall be delivered to and held by the Lessor. The Lessor shall have full power to ad

just, collect, receipt for and compromise any claims under any of said policies of insurance. * * *

"The Lessee further covenants and agrees to promptly pay or cause to be paid before delinquency all taxes, charges and assessments levied or assessed or payable on or before January 1, 1935, upon or against said demised premises and properties, or any part thereof, or any interest of the Lessor or the Lessee therein, * * * and to keep said demised properties free and clear of all claims, or encumbrances affecting or purporting to affect the title. * * *

"At any time during the term hereof, provided that the Lessee shall not be in default in the performance of any promise, covenant or condition herein contained provided to be performed by the Lessee, Lessee is hereby granted the option to purchase said demised premises and properties from the Lessor for a purchase price of Thirty-five Thousand and no/100 Dollars ($35,000.00), together with interest thereon at the rate of six per cent (6%) per annum from the 1st day of January, 1936, to the date upon which the Lessee agrees to purchase said property in accordance with the terms of the said option. Said option shall be exercised by the delivery of written notice of the exercise thereof to the Lessor at the place where the rent hereunder shall be payable. * * *

"The purchase price shall be payable as follows: Seventeen Thousand Five Hundred and no/100 Dollars ($17,500.00) of said purchase price and a sum equal to interest upon said purchase price at the aforesaid rate from January 1, 1936, until the date of the exercise of said option shall be paid by the Lessee to the Lessor upon the date the Lessee exercises his option to purchase said prop-

erty. There shall be credited upon said payment and upon said purchase price all payments theretofore received by the Lessor from the Lessee as rental pursuant to the terms hereof. The balance of the said purchase price, together with interest thereon at the rate of six percent (6%) per annum from the date upon which the Lessee exercises the said option until the entire purchase price is fully paid, shall be payable in quarterly installments of Eight Hundred Seventy-five and no/100 Dollars ($875.00) plus interest on balance due as above set forth, said payment being due and payable on the first day of January, April, July and October of each year until the whole purchase price has been paid. * * *

"The Lessor may deliver a good and sufficient deed to the Lessee conveying title to said property * * *. Contemporaneously with the delivery of said deed, the Lessee, shall either pay the unpaid balance of the purchase price or execute and deliver to the Lessor his several promissory notes, payable to western * * * in a sum equal to the unpaid balance of the purchase price with interest * * *."

On December 1, 1934, Lack wrote Paul W. Richardson (Western's California manager) a letter reading, in part, as follows:

"Upon request of Mr. [Charles R.] Berdel, your San Diego agent, am submitting to you my understanding of the purchase by me of the Hotel Dunlack property, situate in Brawley, California. The executive board of [Western] accepted my written proposition[7] for the purchase of the property, and you were authorized by [West

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[7]The proposition made in Lack's letter of September 6, 1934.

ern's] Salt Lake office to notify me to that effect and further told me I could go ahead and make purchase of new lobby furniture and rehabilitate the hotel, which I proceeded to do. I also signed the contract[8] prepared by you for the purchase and executed and delivered a bill of sale to [Western] for the entire furnishings of the hotel, thereby complying with my part of the contract to the letter. * * * The question of taxes came up at the meeting of the executive board and you told them all taxes had been paid. However, that does not enter into it, for I purchased the property for a fixed amount. * * *."

Lack took possession of the property on January 1, 1935, and continuously thereafter retained such possession. Between January 1, 1935, and May 18, 1940, he made improvements and placed new equipment in the building, expended therefor more than $18,000, and made each and all of the quarterly payments which the contract required of him during that period. In 1939 he procured and caused to be issued and delivered by Pearl to Western two insurance policies (Nos. 514,753 and 515,739) dated, respectively, May 6, 1939, and November 6, 1939.[9] Thereby Pearl insured Western against loss or damage to the building by fire or earthquake. Each policy provided:

"It is understood that F. S. Lack (hereinafter termed vendee) has an interest in the within described property by virtue of contract of sale from Western Loan & Build-

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[8]The contract of November 10, 1934.

[9]Policy No. 514,753 was issued and mailed to Western on or about March 15, 1939. Receipt thereof was acknowledged by Western on April 26, 1939. Policy No. 515,739 was issued and mailed to Western on or about August 30, 1939. Receipt thereof was acknowledged by Western on September 20, 1939.

ing Company of Salt Lake City, Utah (hereinafter termed vendor).

"* * * If this policy be not payable to a mortgagee, trustee or beneficiary under the deed of trust,[10] the proceeds of this policy, subject to all its terms and conditions, shall be payable to said vendor and/or said vendee as follows:

"First: To said vendor, to an amount not exceeding the balance unpaid, at the time of loss, upon the contract of sale above referred to; and

"Second: The balance, if any, to said vendee."

On May 18, 1940, the building was damaged by an earthquake. Between May 18, 1940, and July 1, 1940, Western and Lack submitted to Pearl a joint proof of loss, and Western's agent told Lack that he need not make any of the payments falling due under the contract after May 18, 1940; that they (Western and Lack) could "settle that up" after they received the insurance money. Lack consequently made no further payments. On September 11, 1940, Pearl, Western and Lack executed an agreement determining the extent of the damage to the building. In that agreement Western and Lack described themselves as vendor and vendee. The damage to the building was such that, under its policies hereinabove mentioned, Pearl was liable for $28,067.87. This sum was claimed by Western and by Lack.

Western's action against Lack and Pearl was commenced on December 16, 1940. Lack's action against Western was commenced on December 30, 1940. In each

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[10]Neither policy was payable to a mortgagee, trustee or beneficiary under deed of trust.

action, Lack alleged and Western denied that Lack had exercised the option granted him by the contract of November 10, 1934. The trial court found that Lack had not exercised the option. The correctness of that finding is challenged by this appeal.

As shown above, the contract provided that the option should be exercised "by the delivery of written notice of the exercise thereof" to Western. No particular form of notice was required. Any writing which apprised Western of Lack's exercise of the option was sufficient. Lack did not, so far as the record shows, deliver to Western a written notice stating: "I hereby notify you of my exercise of the option." He did, however, write Western a letter (hereinabove quoted) on December 1, 1934; cause the letter to be delivered to Western on or before Decembr 4, 1934 procure policy No. 514,753 on March 15, 1939; and cause the policy to be delivered to Western on or before April 26, 1939.[11] The letter declared that Lack had purchased the property mentioned in the contract. The policy declared that Lack had an interest in the property by virtue of a contract of sale from Western to Lack. The policy described Western and Lack as vendor and vendee. It is clear that the policy (if not the letter) constituted written notice of Lack's exercise of the option. We hold, therefore, that the option was exercised on, if not before, April 26, 1939.

The damage to the building by the earthquake of May 18, 1940, was such that it could not be repaired in 20 working days.[12] Therefore, by the terms of the contract,

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[11]Also, on August 30, 1939, Lack procured policy No. 515,739, the language of which was identical with that of policy No. 514,753. Policy No. 515,739 was delivered to Western on or before September 20, 1939.

[12]The trial court so found, and the finding is not challenged.

the lease from Western to Lack (if not terminated by the exercise of the option) would have been terminated by the earthquake. Western contends that the earthquake terminated, not only the lease, but also the period during which the option could be exercised. Whether this contention is correct or not need not be considered; for, as has already been shown, Lack exercised the option long before the earthquake.

Having exercised the option, Lack was obligated to pay Western the purchase price of the property ($35,000), plus interest, less quarterly payments made by him, as provided in the contract, and Western was obligated to convey the property to Lack upon receipt of the purchase price, plus interest, less such quarterly payments. Lack's quarterly payments prior to May 18, 1940, were sufficient to pay $15,750 of the purchase price, plus interest to July 1, 1940, leaving an unpaid balance of $19,250. Thus, of the $28,067.87 for which Pearl was liable under its policies, $19,250 was payable to Western, and $8,817.87 was payable to Lack.

Lack claimed the entire $28,067.87, including Western's $19,250. The ground of his claim was that, by the terms of the contract, Western was obligated to repair the damage to the building at its own expense, but had failed to do so; that Lack, therefore, was entitled to make such repairs at Western's expense; and that such repairs would cost more than $28,067.87. The claim, in so far as it related to Western's $19,250, was properly rejected; for, as said before, the damage to the building could not be repaired in 20 working days. Therefore Western was under no obligation to make such repairs or to pay the cost thereof.

In Western's action against Lack and Pearl, Western alleged that Lack "failed to pay the taxes for the year 1940 on said property to the amount of $817.73," and that Western was required to and did pay said taxes. In Lack's action against Western, Western alleged that Lack "defaulted in the payment of taxes as agreed by him" and was "in default thereof in the sum of $3,784.16." These allegations were denied and not proved. There was no finding, nor any basis for finding, that Western was required to or did pay any tax on the property, or that Lack was at any time "in default thereof."

The judgment (so far as here appealed from) is reversed, and the case is remanded with directions to enter judgment awarding to Western $19,250 of the $28,067.87 deposited by Pearl in the registry of the court, awarding to Lack the balance ($8,817.87) of said $28,067.87, and requiring Western to convey to Lack all the property hereinabove mentioned.

Reversed and remanded.

(Endorsed): Opinion. Filed Apr. 9, 1943. Paul P. O'Brien, Clerk.